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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 729.

ELISABETH BYRNE, ADMINISTRATRIX OF THE ESTATE OF JOE G. IRBY, DECEASED,

Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTION PRESENTED.

Should this Court grant certiorari to consider the narrow question of the legal sufficiency of evidence of employment under the Federal Employers' Liability Act, where that question was resolved against petitioner by the trial court; a jury found adversely to petitioner on a special interrogatory specifically addressed to the issue of employment after a charge to which petitioner took no cogent objection; the trial court again rejected petitioner's contention on post-trial motions; and the Court of Appeals for the Third Circuit unanimously affirmed the legal sufficiency of the evidence and again rejected petitioner's contention in its denial of petitioner's application for a rehearing on that simple issue?

STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C. section 51, provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This is an action to recover damages for the wrongful death of respondent's decedent, Joe G. Irby. The jury answered numerous special interrogatories but the answer to only one is pertinent in this proceeding. That interrogatory was "Was Mr. Irby at the time of the accident an employee of the Pennsylvania Railroad Company?" (364a). The jury answered this interrogatory: "Yes" (364a).

Respondent was obliged to prove her case by the testimony of reluctant witnesses who were conservatively characterized by Chief Judge Kirkpatrick as witnesses who were ". . . thoroughly enlisted in the cause of their employer . . ."[1] Despite this obvious handicap, but with the aid of numerous depositions and the timely and pointed questions of the Chief Judge, the respondent produced the following strong evidence of decedent's status in order to show that he was an employee of both Westinghouse and the Pennsylvania Railroad.

Irby was an electrical engineer (52a). He had originally been employed by Westinghouse Electric Company and his job was to work on two locomotives which Westinghouse sold to the Pennsylvania Railroad. Title had passed to it on November 7, 1951 (117a, 174a). Under the contract of sale, Westinghouse warranted the satisfaction of the locomotive to petitioner for a period of one year, the expiration of which was November 7, 1952 (120a). (In his opening address, counsel for petitioner inaccurately advised the jury that the warranty period was 18 months [42a].) Thereafter, Irby was killed on January 7, 1953. These were so-called "rectifier locomotives" which differed from other electric locomotives in that they had an "ignitron"—an electrical device—in their power system.

As witness Shinn, petitioner's assistant foreman in charge of maintenance, testified, Irby's full-time job was to

1. Petition, Appendix, p. 7.

see to it that these engines were kept moving and in operating condition in regular Pennsylvania Railroad service (67a). The decedent was at *all* times working exclusively on these Pennsylvania Railroad engines and *only* on Pennsylvania Railroad premises and lines (259a-260a). Aside from paying decedent (our contradictory proof of which was, we believe, erroneously held to be insufficient [122a-125a, 359a]) Westinghouse's only connection with Irby was that after his work was done he would send reports concerning the operation of the engine to Westinghouse (126).

On the other hand, the evidence showed that Irby routinely did a great deal of conventional railroad maintenance and repair work for the petitioner and that he was in constant contact with petitioner's maintenance men, supervisors and engineers (244a). The jobs that Irby did were regular normal tasks which would have been done in his absence by the Railroad employees (244a). All of Irby's work was done on premises and equipment owned by the petitioner (69a, 70a, 86a, 259a-260a). In order to make repairs Irby had available petitioner's usual MP62 reports which contained information as to what was wrong with the locomotive (66a). These reports were prepared by petitioner's enginemen and were required by I. C. C. regulations (65a).

Irby had been working on these locomotives exclusively for fourteen continuous months prior to the accident (164a). During the course of that unbroken fourteen month period he rode solely on petitioner's engines and solely over its railroad system (163a). When he rode on petitioner's engine he performed actual and conventional everyday railroading operational tasks, all of which were totally foreign and alien to any conceivable Westinghouse operation. He would call out signals, observe passing trains and would look out for any objects protruding from the side of those passing trains to protect petitioner's rolling stock (142a). He was then under the supervision of the train engineman who gave him orders (142a).

Irby had a pass to ride on all Pennsylvania Railroad equipment. As a precondition to the issuance of this pass, petitioner expressly insisted that the use of the pass ". . . will be restricted solely to the business of the Pennsylvania Railroad Company . . ." (870a). He was actually allowed to ride on other Pennsylvania Railroad trains (261a). When Irby was not riding on the trains he was fixing various equipment on the locomotives which included not only the electrical equipment peculiar to these locomotives (for which he had special training), but also all other usual equipment normally found on all electric locomotives in the Pennsylvania Railroad system (D26—offered in evidence 348a). The only electrical equipment peculiar to these locomotives was an ignitron (113a).

Irby was subject to telephone calls at home from the Pennsylvania Railroad Company's supervisory employees who would direct him to go to different places to meet the locomotive and perform work on it (151a). In addition, it is conceded that the decedent did instruct and train the regular Pennsylvania Railroad Company employees in the intricacies of the locomotive and tell them how to maintain it, how to take care of it, and to give advice and guidance in respect to its operation and use (76a).

If the Railroad desired to keep the locomotive in service, it could and did tell Irby not to work on it (332a), and when there was something which was not an emergency, the Railroad would tell Irby to wait until the monthly inspection period (326a-327a). Marsh, a Railroad superintendent of equipment, testified that if there was a locomotive defect, Irby would let the supervisor for the Railroad know ". . . and we [the Railroad] would decide what would be done" (325a).

The decedent usually reported to the aforementioned Railroad Company boss Shinn when he came to work (72a) and told Shinn when he was leaving (73a). If the decedent found anything wrong with a locomotive during the monthly inspection, he would tell the Railroad people about it and they would include it in their monthly inspection report

(81a). The Railroad is required by law to make this report (51a). During all of the time that Irby worked on these engines he would be assigned Railroad men by the Railroad foremen to help with the work (76a). In fact, sometimes even if there were no spare men, Irby would be assigned a man anyway (76a). These men took orders from Irby (111a). The Railroad witness Trowill admitted that Irby's services were of great benefit to the Railroad (91a). Irby was under the direct and specific control of and took orders from the Railroad supervisor (96a).

At the time of the accident and for a period of a couple of days prior thereto, the locomotive involved was in the Wilmington yard for a monthly inspection (52a). Shortly before the accident the decedent was engaged in undercutting or stoning a commutator (83a). The job was one that any ordinary railroad electrician could have done and normally does (90a). Irby had been assigned a regular company employee to assist him in this job (85a). He was not engaged in working on the ignitron at the time of the accident and the ignitron in no way contributed to the accident (113a, 114a).

Under all of this evidence the trial judge in a charge to which ". . . no cogent objection was made . . ."[2] by petitioner permitted the jury to find that Irby was the dual employee of both Westinghouse and the Pennsylvania Railroad. After the jury verdict the Chief Judge denied defendant's motion for a directed verdict or a new trial.

After a careful review of the evidence, the Court of Appeals for the Third Circuit, in a unanimous opinion written by Chief Judge Biggs and joined in by Judges Maris and Goodrich, held that the evidence was legally sufficient on the issue of employment and thereafter that same court rejected petitioner's application for a rehearing on that issue. This Petition followed.

2. *Id.*, Appendix, p. 18.

ARGUMENT.

Introduction.

The instant Petition is nothing more than an effort to extract from this case a supposed conflict with applicable law and an imagined disturbance of a long-standing commercial practice in railroads' use of independent contractors. In fact, there is neither such conflict nor disturbance. What does genuinely exist—and it has always been the only issue in the case—is what was unanimously described with exactitude by the Court of Appeals below as follows:

> "The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad."[3]

This issue was resolved in respondent's favor by Chief Judge Kirkpatrick at the trial of the case where, on a special interrogatory addressed specifically to the question of employment, a jury expressly found as a fact decedent's employment with petitioner after a charge to which petitioner took no cogent objection (364a). Chief Judge Kirkpatrick thereafter reiterated the sufficiency of the evidence in his opinion denying petitioner's motion for judgment n. o. v. This holding was unanimously affirmed by the Court of Appeals for the Third Circuit. Both courts followed the letter and spirit of this Court's previous holdings as to the applicable tests to be applied.

In the following argument we shall, first, prove the fiction of petitioner's representations that a conflict exists and that such conflict, if not resolved by this Court will disrupt railroads' use of independent contractors. Second, notwithstanding the extremely careful and repeated lower court reviews of the evidence, petitioner has unfortunately

3. Per Chief Judge Biggs, *Id.*, Appendix, p. 13.

seen fit to attempt yet another review of that same evidence here. Since petitioner has seriously erred in its representations to this Court of the evidence we shall demonstrate the gross inaccuracies of those representations.

I.

The Decision Below Resulted From the Exact and Absolutely Consistent Application of Settled Rules of Law and Therefore It Creates Neither Conflict in the Law Nor Any Interference With Railroads' Utilization of Independent Contractors.

In *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 35 S. Ct. 491 (1915), this Court held that the word "employee" as used in the Federal Employers' Liability Act is employed in its natural sense and is intended to describe the conventional relationship of employer and employee. Petitioner makes the blunt assertion that the decision of the court below is in conflict with *Robinson* ". . . and the numerous federal decisions following that case."[4]

The decisional law flowing from *Robinson* developed controlling standards which for years have very clearly taught what the conventional usage of the word "employee" means. The conduct of petitioner throughout this entire litigation has been to resist these clear teachings with a blind insistence that those post-*Robinson* cases do not say what in truth they do say. It has done so by repeatedly claiming that there is only one determinant of employment—control.

Both courts below have destroyed that argument by conclusive analysis and citation to the authorities. Thus, having been shown to be incorrect on the applicable tests controlling this problem, the petitioner should have been expected candidly to acknowledge that when Chief Judge Biggs wrote as follows for the court below, he was simply

4. *Id.*, p. 9.

reiterating the applicable tests for determining the conventional meaning of employment:

> "The word 'employee' as used in the Federal Employers' Liability Act [footnote] is employed in its natural sense and is intended to describe the conventional relation of an employee and employer. Robinson v. Baltimore & Ohio R. R., 237 U. S. 84, 94 (1915). While it is true that '[E]ach case must be decided on its peculiar facts . . .', Cimorelli v. New York Cent. R. R. Co., 148 F. 2d 575, 577 (6 Cir. 1945), the test of who has the 'right to control' the activities of the workman is the generally accepted criterion determining employment status. See Restatement, Agency § 220 (1933). The test was employed in Chicago, Rock Island & Pac. Ry. v. Boyd, 240 U. S. 449 (1916) and in DelVecchio v. Pennsylvania R. R. Co., 233 F. 2d 2 (3 Cir.), cert. denied 352 U. S. 909 (1956), without reference to whose work was being done. But the 'right to control' is a conclusion to be drawn from a consideration of all the relevant facts of the relationship between the worker and those whose work he does and, as is pointed out in both Standard Oil Co. v. Anderson and Linstead v. Chesapeake & Ohio Ry., *supra*, the question of 'whose work is being done' is a factor which the jury must consider in determining the 'right to control'. We point out that the phrase 'right to control' is not a single magical solvent for the 'right to control' must be considered in the light of other incidents relating to the work performed. Thus the status of employment is established. See Restatement, Agency § 200, Comment b (1933)."[5]

5. *Id.*, Appendix, pp. 15-16. The above citation to § 200 of the Restatement of Agency is, we believe, an inadvertent typographical error in the official printed opinion of the Court of Appeals. It should read § 220. We are taking the necessary steps to have the error officially corrected and will so advise this Court when that is accomplished.

All that remained to be done has been fairly done: the courts below have decided that there was, as a matter of law, sufficient evidence of employment within *Robinson* terms for submission to a jury, and a jury fairly decided the issue after a charge that accurately instructed in *Robinson* terms. But instead of being candid about this, petitioner now attempts to transmute that authoritatively settled issue into a different one remarkable both for its unrelenting ingenuity and complete lack of relationship with anything that is connected to the relevant law.

The new argument now presented for the first time in the entire litigation is to the effect that since decedent was admittedly at least Westinghouse's employee, it is legally impossible that he could have also been petitioner's employee. In order to demonstrate this petitioner urges, *as a matter of law*, that since Westinghouse was an independent contractor, Irby could not also be in petitioner's employment.

It is immediately dispositive of this argument to say that no case has ever held nor even suggested what petitioner urges and least of all do the cases cited by petitioner at page 10 of its Petition say so. Yet they are cited by petitioner as in conflict with the decision below and therefore are said to ground the grant of the Writ.

The impossibility of petitioner's view is manifest. To determine employment in the *Robinson* sense, the conventional tests must be made on the facts of claimed employment. The claimed employee's exact status can be determined only after that analysis is made of his relationship to his work and with the employer sought to be charged. But rather than make these tests petitioner instead bluntly states that one can never be dually employed by an independent contractor and a railroad. It insists on this conclusion by the fruitlessly repeated use of the label "independent contractor" but with an absolute failure to cite any authority to support it.

To prove this undocumented conclusion, petitioner proposes the following premise: dual employment for an independent contractor and a railroad is a ". . . new employer-employee relationship never heretofore recognized in the law."[6]

Repeatedly, petitioner has said, the courts below have held, and we agree, that "employment" under the Federal Employers' Liability Act is used in its conventional sense. We know that such conventional sense includes a wholly borrowed employee and petitioner admits that in its analysis of *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28 (1928) at p. 14 of the Petition. We also know that an authoritatively settled form of conventionally understood employment is dual employment. *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200 (C. A. 3, 1954); *Atlantic*

6. *Id.*, p. 21. Having said this with an apparent finality, petitioner proceeds in footnote 12 of p. 21 of the Petition to suggest the undoing of its own absolute. Throughout its Petition it relies heavily upon the candid concession by counsel for respondent that Irby was not a wholly loaned employee. In footnote 12 petitioner finally admits that there can be a partially loaned or dual employment but only if such employee is performing a job ". . . *separate and apart* from his regular work for the contractor." This limitation on duality—the requirement of "*separate and apart*" (italics supplied)—makes duality non-existent. If we have an employee "separate and apart" of course he becomes a wholly loaned employee which is itself a specific form of employment. Thus neither the Restatement of Agency nor any of the cases defining dual employment imposes such a limitation. The Restatement of Agency § 226 states:

> "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other."

It is only the petitioner who engrafts this "separate and apart" limitation on a relationship which requires in the words of *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200, 203 (C. A. 3, 1954) per Judge Staley:

> "* * * That is, a person may be the servant of two masters, not joint employers, at the same time as to the same act, provided that service to one does not involve an abandonment of service to the other. Such is the case where the employee is transferred to carry on work which is of mutual interest to both of two employers and to effect their common purpose."

Coast Line R. R. Co. v. Tredway, 120 Va. 735, 93 S. E. 560 (1917); *Siidekum v. Animal Rescue League*, 353 Pa. 408 (1946); *Bartl v. Crawford Door Sales Co.*, 394 Pa. 512 (1959); Restatement of Agency § 226.

Finally, the total artificiality of petitioner's last-ditch effort to create an issue that truly does not exist in this case is vividly demonstrated in its treatment of the *Dickerson* case, *supra*, at page 31 of its brief below in the Court of Appeals. There it said:

> ". . . In *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200 (3d. Cir. 1954), suit was brought against the owner of a clinic for employees and the issue was whether the nurse who injured plaintiff was employed by the owner of the clinic, which paid her and had the power to control her, or by the surgeon who directed her work and *was found to be an independent contractor*. In reversing a directed verdict for defendant, the court held that the jury could have found that she was the servant of both. . . . (Italics supplied.)

At that time petitioner obviously found it very easy to recognize dual employment which included an independent contractor. There is absolutely no reason why it should not be able to recognize that now.

To say this is to end the matter. Because "employment" under the Federal Employers' Liability Act is used in its conventional sense the fact that petitioner happens to be a railroad is of no more legal consequence as regards the issue of employment than if it happened to be a sugar refinery, an animal rescue league or any other form of enterprise, and it is indeed of great significance that nowhere has petitioner ever argued or suggested what legal difference there could be.

In sum the decisions below hold that where a company sells a locomotive to a railroad and where such company without contractual obligation supplies an electrical engineer who works exclusively on a railroad's equipment for

a period of 14 months, riding on it, fixing it, etc. and where there is evidence that the railroad exercises control over such engineer and he is subject to the orders of the railroad personnel and does the railroad's work, a jury question exists as to whether he is a joint employee of both the railroad and his original employer.

Such a decision is, of course, narrowly limited to those cases where the evidence is sufficient to show that the employee in question was doing the railroad's work and the railroad had the right to control him. The case is nothing more than a proper application of the cases of *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (C. A. 6, 1945); *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949) and *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (C. A. 6, 1947). It applies settled law and in no sense could disturb or affect any true independent contractor relationship. If a railroad executes a contract and thereafter has little or nothing to do with the direction and control of the contractor's employees, and they are not doing the railroad's work, these employees cannot be held the railroad's employees. That, of course is not this case.

As a matter of fact the Railroad has in the instant case protected itself from the damages awarded by an indemnity agreement (27a, 824a). This agreement makes the seller of the locomotives responsible for the judgment here. Undoubtedly the Railroad in most if not all of its contracts with others requires such a provision. Therefore, the mournfully dire prediction that this case would "... put to an end a long standing and widespread business practice in the railroad industry ..."[7] of hiring independent contractors is pure fiction.

No matter what the outcome of this case, railroads may and unquestionably will go on just as they have in the past hiring independent contractors and providing for indemnity agreements securing their complete financial protection. The classical industrial technique of utilizing the indemnity

7. *Id.*, p. 28.

agreement is thus a complete answer to petitioner's effort to create the impression that the result below will have a disruptive policy effect. It surely will not.

Furthermore, petitioner's argument would seem to create the impression that if it were immunized against liability under the Federal Employers' Liability Act, all of its liability problems would fall away. This too is simply not so.

Since liability will attach either under the federal or state law (depending on the facts of employment), it is inconceivable that any railroad will stop making contracts for reasons of liability exposure. Liability imposed by state laws on negligent railroads has not hindered them from making contracts for services. Liability imposed by federal laws on negligent railroads will not prevent such contracts either. In either event railroads have and regularly use a settled technique for meeting this problem: indemnity agreements. There is such an agreement in this very case.

II.

The Evidence Was Legally Sufficient.

Since the courts below applied the accepted legal standards and upheld the jury verdict, petitioner is eventually forced to argue the only question that was ever really in the case: the sufficiency of the evidence.[8]

After putting this question, petitioner then states all of the facts and inferences favorable to it. It ignores as it did in its appeal below, the fact that Chief Judge Kirkpatrick said:

> "... I would not go so far as to say that these witnesses were hostile, but if was quite evident that several

8. Petitioner (Petition, p. 20) states the matter thus: "There Was No Valid Basis for a Jury Finding That Decedent Was the Employee of the Railroad and of an Independent Contractor at the Same Time."

> of them were thoroughly enlisted in the cause of their employer and the jury would have been justified in discarding at least some of their testimony . . . ."[9]

Moreover it tries to forget that respondent was awarded the jury verdict.

In contrast to petitioner's statement of the facts the court below relied upon the following facts:

Since there was no contract between the Railroad and Westinghouse,[10] the Railroad had the right to direct what Irby should or should not do with the Railroad's equipment (811a). The equipment was owned by the Railroad and the work was being done on its premises. Marsh, a Railroad superintendent of equipment, testified that if there was a locomotive defect, Irby would let the supervisor for the Railroad know ". . . and we [the Railroad] would decide what would be done" (325a). Coleman, a Westinghouse man, testified that the railroad would have to agree to what Westinghouse planned to do from an engineering standpoint before it could be done (214a). Both of these men were petitioner's own witnesses.

> ". . . the Railroad could not 'fire' him from his employment with Westinghouse, but it could, without consulting Westinghouse 'fire' him from his job with the Railroad on the locomotives if he did not do the work it wanted done or did not do it in the way it wanted him to."[11]

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9. Petition, Appendix, p. 7.

10. Petitioner has assumed throughout that Westinghouse was an "independent contractor". It may well be that with respect to the sale of the locomotive, the term "independent contractor" could be stretched to include Westinghouse. Actually, even as to this Westinghouse would be more accurately called a seller. Since there was no contract between Westinghouse and the Railroad which sets forth any terms under which Irby worked, oral testimony was necessary to show the relationship. All of this was, of course, for the jury to believe or disbelieve.

11. Petition, Appendix, pp. 5, 6.

This is certainly a legitimate inference from the record. It was the equipment of the Railroad, and it is carping to say that the conclusion is not supported by the record. Even Marsh, who certainly was ". . . thoroughly enlisted in the cause of '[his] employer'" reluctantly admitted that they could have ordered Irby off their engines or even out of the Railroad's shop (327a-328a).

The Railroad selected both the time and place for the work to be done (812a). Marsh testified that if the Railroad desired to keep a locomotive in service it could and did tell Irby not to work on it (332a), and when there was something which was not an emergency the Railroad would tell Irby to wait until the monthly inspection period (326a-327a). This is but another element of the right to control the "undertaking as a whole."[12]

Irby was on Railroad call twenty-four hours a day, and when the locomotive would break down on the road someone from the Railroad would call him and tell him to come and report there (151a).

The Railroad shop foreman would point out the work to be done and Irby would be expected to do it (812a). The reasonable inference from the evidence is that Irby *had* to do it (96a).

Irby would ride in the cabs of the locomotives and, under orders, performed and could be expected to perform tasks normally those of the brakemen and firemen. When he did so he was under the control of the Railroad engineer (812a). He was doing work totally foreign to his normal work as an electrical engineer at Westinghouse shops. It is in the face of this kind of critically important evidence that petitioner speaks so curiously of respondent's total failure to establish Railroad control.

Thus, the Railroad told Irby where, when and, at times, what to do. This was a demonstration of both the right and the power to control.

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12. *Jones v. George F. Getty Oil Co.*, 92 F. 2d 255, 263 (C.A. 10, 1937).

The other test of employment substantiated by *Robinson, supra*, and those cases following it is "whose work" was the person doing. There is ample evidence to sustain the finding that the decedent was doing the work of the Railroad. The decedent usually reported to Mr. Shinn, the Pennsylvania Railroad Company's boss when he came to work (72a), and told him when he was leaving (73a). If the decedent found anything wrong on the locomotives, on the monthly inspections, he would report to the Pennsylvania Railroad Company people about the difficulty and they would include it on the monthly inspection report (81a). The Railroad is compelled by law to make these inspections (51a). Irby would ask for men to assist him in getting the conditions corrected and the Railroad foreman of the Wilmington shops would order his men to work under Irby. They in turn took orders from him (71a, 88a-89a). We may be sure that the Pennsylvania Railroad Company would not have supplied these railroad men if it were not very deeply convinced that they, along with Irby, were genuinely doing Pennsylvania Railroad work. Indeed, there was square testimony to the effect that the decedent's services were of great benefit to the Pennsylvania Railroad Company (91a). The Pennsylvania Railroad Company's men and he made the repairs together (91a).

Petitioner initially admitted that "decedent in the thirty-six hours immediately preceding the accident was completing the inspection and servicing of the electrical equipment on Pennsylvania Railroad Company's engine 4996 during its monthly overhaul" (137a). The locomotive was in for a regular monthly inspection and that was being done at the time (52a). Just shortly before this accident occurred the decedent had been engaged in the undercutting of the commutator (stoning) (83a). What the decedent was doing on the commutator was also known as "truing up" (82a). This is a simple job that any regular railroad electrician could have done (90a). Having stoned the commutator, the decedent at the moment of the accident was

working in the number two switch compartment of the locomotive near the transformer blower motor running contactor (164a). He was not engaged in working on the ignitrons which were the only distinguishing feature in this locomotive that set it apart from all other electric locomotives (113a-114a). The man assigned to assist Irby was one Moore, a regular Pennsylvania Railroad Company employee (85a-86a).

Monthly inspection by the Pennsylvania Railroad Company calls for an inspection of the generator for worn commutators and brushes (115a). Actually, the decedent was working with his own hands doing this job—engaged in manual labor, not supervision (218a). Hence, the decedent was doing ordinary routine work shortly before and at the moment of the accident that normally would have been done by a Pennsylvania Railroad Company employee. In so acting he was certainly doing the work of the Pennsylvania Railroad Company. When he rode on the locomotive (as he frequently did) on its runs over the defendant's system and called signals, watched the right of way and checked passing trains for protruding dangers, he was rendering a service as a Pennsylvania Railroad employee alone and in no way even remotely associated with the duties normally performed by a Westinghouse electrical engineer.

The petitioner had produced certain green sheets as part of its case, examination of which revealed twenty-two individual items which the jury could have found the respondent's decedent had done which were obviously ordinary every day bread and butter jobs that regular Pennsylvania Railroad Company men would do (231a-238a). The individual pieces of equipment which were being worked on were not things which were singular or peculiar to this particular locomotive; they were common to all locomotives that the Pennsylvania Railroad Company has and Pennsylvania Railroad Company men regularly repaired them (236a-239a). Yet, we find from an examination of Irby's

own green papers which the petitioner produced in the case that he did do that sort of work. There was nothing among those things that he did repair that a Pennsylvania Railroad Company man could not have done (238a) including stoning a commutator which is done on every electric locomotive and which Pennsylvania Railroad Company men regularly do (240a).

All of this work was typical, regular, routine labor representative of that which the Railroad does on all its other locomotives. Since ordinarily it has its own employees do such work and since much of it was done in connection with the monthly inspections which under the regulations of the Interstate Commerce Commission (49 C. F. R. 91.51 and 91.331) are supposed to be done by a railroad company itself, it was non-delegable labor.

All of this evidence of control and evidence that Irby was doing the Railroad's work was submitted to the jury. It was substantial, credible evidence. Its sufficiency has been diligently and accurately reviewed by Chief Judge Kirkpatrick and the Court of Appeals. It has been held to be sufficient. Palpably, this narrow question is not one which should be reviewed by this Court, and least of all when it has received the extremely careful consideration it has in the courts below and the consequent correct result.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

B. Nathaniel Richter,
Charles A. Lord,
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